No. 91-40[illegible]

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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JAMES F. HAGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard in reviewing the district court's finding that petitioner was competent to stand trial.

2. Whether the district court's finding that petitioner was competent to stand trial was clearly erroneous.

3. Whether the district court denied petitioner a fair hearing on the question of his competence to stand trial.

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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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No. 91-466

JAMES F. HAGER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-10a, is unreported, but the judgment is noted at 936 F.2d 573 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on June 21, 1991. The petition for a writ of certiorari was filed on September 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Southern District of Ohio, petitioner was convicted of one count of con-

spiracy to distribute marijuana, in violation of 21 U.S.C. 846; unlawful importation of marijuana, in violation of 21 U.S.C. 952(a); and income tax evasion, in violation of 26 U.S.C. 7201.[1] He was sentenced to 12 years' imprisonment, to be followed by two years' supervised release. The court of appeals affirmed.

1. The facts pertaining to petitioner's competence to stand trial are summarized in the opinion of the court below. Pet. App. 2a-7a, 11a-15a. On December 19, 1985, petitioner and 11 co-defendants were indicted on multiple violations of federal law arising from their participation in an international drug smuggling and distribution ring that operated between 1977 and 1984. Petitioner remained a fugitive until his arrest on April 24, 1989.

While awaiting trial, petitioner sustained a head injury during a fight. In light of that injury, petitioner filed a motion requesting a determination of whether he was competent to stand trial. The district court ordered petitioner to undergo psychological evaluation at the federal medical facility in Springfield, Missouri. Shortly after arriving at the facility, petitioner suffered a second skull injury during another fight. On August 30, 1989, a staff psychologist, Dr. David Reuterfors, reported that petitioner had suffered "various organic impairments as a result of being assaulted in jail" and that petitioner's "present mental defect [has] an adverse effect on his competency to stand trial." Pet. App. 18a, 22a. Although

[1] By agreement of the parties, nine other counts arising from petitioner's participation in the drug trafficking conspiracy were dismissed without prejudice and are subject to reinstatement in the event petitioner's convictions are reversed or his case is remanded for a new trial. Gov't C.A. Br. 4.

finding that petitioner was "presently incompetent to stand trial," Dr. Reuterfors concluded that it was "possible * * * that gradually over time improvement may occur." Pet. App. 22a-23a.

In light of Dr. Reuterfor's report, the parties jointly moved for and the district court ordered a second evaluation at the Springfield facility. At the end of the evaluation period, Dr. Donald Butts, a staff psychiatrist, prepared a written report indicating that petitioner "is not competent to stand trial" and that his prospects for future improvement were "unpredictable" in the absence of proper rehabilitative care. Pet. App. 29a.

At the ensuing competency hearing, Dr. Butts testified that petitioner had incurred a brain injury that manifested itself in stuttering and partial spasticity in petitioner's right limbs. Pet. App. 3a. According to Dr. Butts, it is "almost invariably true" that brain damage affecting physical functioning in this manner will also affect psychological functioning, because "the same area of the brain performs several functions." *Ibid.* Although petitioner's long-term memory was "still * * * largely there," Dr. Butts stated that petitioner had little short-term memory, lacked the ability to comprehend the testimony of witnesses, and "would probably deteriorate on the stand" if called to testify in his own defense. *Id.* at 4a-5a, 12a. Dr. Butts therefore concluded that petitioner was "not * * * competent to proceed." *Id.* at 5a.

The government presented the testimony of two lay witnesses to establish that petitioner was feigning incompetence. One witness, a United States Marshal, testified that petitioner did not stutter while being transported from the medical facility to the jail. Pet. App. 5a. A second witness, Scott Hansen, who was petitioner's friend and a mentally compe-

tent federal prisoner working as an orderly at the Springfield facility, testified that petitioner stuttered only when a medical staff member or an inmate other than Hansen was present. *Id.* at 5a-6a. Hansen said that petitioner instructed Hansen to warn him if he failed to stutter while other prisoners were nearby and also discussed with Hansen staging a "seizure" to convince the psychiatrists of his psychological difficulties. *Id.* at 6a, 14a.

Hansen also described a number of events suggesting that petitioner was faking his condition. For example, petitioner regularly checked market quotations in *The Wall Street Journal* for gold and silver prices, explaining to Hansen that he had hidden substantial quantities of gold and silver before his arrest. Pet. App. 6a, 14a. Moreover, Hansen recounted accurate and detailed information that petitioner had confided regarding the nature of the charges in petitioner's indictment. *Ibid.* Finally, Hansen recalled petitioner telling him he wanted to be moved into a state facility in Ohio, where an acquaintance of petitioner's worked. *Ibid.*[2] Petitioner told Hansen that his acquaintance would then testify that petitioner's injuries rendered him permanently incompetent to stand trial. *Id.* at 6a-7a.

2. Based on the evaluation reports and the hearing testimony,[3] the district court concluded that peti-

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[2] Petitioner's acquaintance was David Denner, who administered psychiatric rehabilitation programs for the Ohio Department of Mental Health. Pet. App. 6a. At the competency hearing, Denner testified that he transferred $2500 to Hansen pursuant to petitioner's instructions. *Ibid.*; Gov't C.A. Br. 11.

[3] At the close of the hearing, the district court ordered both sides to submit memorandums in support of their respective positions, and stated its intent to have petitioner sub-

tioner was competent to stand trial. As the district court stated, "the physical complications allegedly suffered by [petitioner] are within his control." Pet. App. 13a. Noting that petitioner could "control his stuttering, act as if [his] arm is impaired, and intentionally and selectively mislead others [into] believing he is experiencing memory loss," the court credited Hansen's testimony that petitioner's symptoms were contrived. *Id.* at 14a-15a.[4] Concluding that petitioner was "simply faking his condition," the district court ruled that petitioner "possesse[d] the ability to effectively assist his counsel in the preparation of his defense and underst[oo]d the nature of this criminal proceeding since he [w]as not presently suffering from any mental illness." *Id.* at 12a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court stated that a district court's determination that a defendant is competent to stand trial "is a finding of fact, which we review only for clear error." The court of appeals then concluded that the district court's finding that petitioner was competent to stand trial was not clearly erroneous. *Id.* at 8a.

Reviewing the record, the court of appeals observed that there was "considerable evidence * * *

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jected to further psychiatric examination. Pet. App. 7a. After the parties filed the requested memorandums, the district court issued its competency ruling without ordering a further examination of petitioner.

[4] As the district court stated, Hansen's credibility "[w]as buttressed" because it was unprompted by promises of reward or special treatment. Pet. App. 15a. Indeed, the court found that Hansen—who had received $2500 from petitioner through Denner—might well have financially disadvantaged himself by testifying against petitioner. *Ibid.*

credited by the district court" indicating that petitioner had "fabricated symptoms" and had "artfully attempted to deceive Dr. Butts, the federal prosecutor, and the district court." Pet. App. 8a-9a. The court of appeals also concluded that the district court did not err in failing to give dispositive weight to Dr. Butts's testimony. As the court of appeals stated, "the physical and psychological symptoms that [petitioner] exhibited were susceptible of fabrication," and Dr. Butts "necessarily relied upon [petitioner's] own self-serving assertions in determining that [petitioner] suffered from confusion and memory loss." *Id.* at 9a. The court of appeals thus upheld the factual determination that petitioner was competent to stand trial.

The court of appeals also rejected petitioner's claim that his due process rights were violated because the government did not provide adequate notice of its intention to call two lay witnesses who discredited petitioner's claim of incompetence and because the district court thereafter disposed of his incompetency claim without benefit of a full and fair hearing. The court of appeals noted that "the record does not reveal that [petitioner] objected" to the testimony of the government's lay witnesses on the ground that the government did not provide adequate notice of its intention to call those witnesses. Pet. App. 9a. The court stated that the "district court's prediction that the court would solicit and evaluate additional psychological evaluations does not excuse [petitioner]'s failure to object." *Id.* at 9a-10a. Furthermore, the court noted that petitioner was free to provide additional evidence as rebuttal to the allegedly unexpected testimony of the government witnesses in the post-hearing memorandums the district court requested

and consulted prior to rendering its final decision. *Id.* at 10a. In such circumstances, the court of appeals concluded, "the district court's actions in relying upon the evidence adduced at the hearing and in the post-hearing memoranda did not offend due process." *Ibid.*

## ARGUMENT

1. Contrary to petitioner's contention, Pet. 22-23, the court of appeals applied the correct legal standard in reviewing the district court's determination that petitioner was competent to stand trial. A defendant is competent to stand trial if he has "a rational as well as factual understanding of the proceedings against him" and a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Dusky* v. *United States*, 362 U.S. 402, 402 (1960). See *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989); *Drope* v. *Missouri*, 420 U.S. 162, 172 (1975). The question whether a defendant is competent under that legal test is a question of fact, *Demosthenes* v. *Ball*, 495 U.S. 731 (1990); *Maggio* v. *Fulford*, 462 U.S. 111, 117 (1983), and the district court's finding that the defendant was competent thus cannot be set aside unless it is clearly erroneous, *United States* v. *Gold*, 790 F.2d 235, 239-240 (2d Cir. 1986); *United States* v. *Winn*, 577 F.2d 86, 92 (9th Cir. 1978) (collecting cases); *United States* v. *Green*, 544 F.2d 138, 145 (3d Cir. 1976), cert. denied, 430 U.S. 910 (1977); *United States* v. *Shepard*, 538 F.2d 107, 110 (6th Cir. 1976); *United States* v. *Holmes*, 452 F.2d 249, 268 (7th Cir. 1971), cert. denied, 405 U.S. 1016 (1972). Accordingly, the court

of appeals applied the correct standard of review in this case.[5]

Petitioner maintains that a more lenient standard of review applies to the determination that a defendant is competent to stand trial. Pet. 22-23. Citing *United States* v. *Makris*, 535 F.2d 899, 907 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977), he asserts that "[a] reviewing court, however, must 'take a hard look at the trial judge's ultimate conclusion [on the competency issue] and not allow the talisman of [the] clearly erroneous [standard] to substitute for thoroughgoing appellate review of quasi-legal issues.'" Pet. 23. *Makris*, however, did not reject the clearly erroneous standard of review. Moreover, even if it had, the Fifth Circuit's decision in *Makris* preceded this Court's 1983 decision in *Maggio* v. *Fulford*, *supra*, as well as the Court's 1990 decision in *Demosthenes* v. *Ball*, *supra*, both of which held that the question whether the defendant is competent is a question of fact. There is also nothing about the facts or posture of this case that would justify a different standard of appellate review. The district court's competency determination turned exclusively on the court's resolution of credibility evaluations and disputed factual issues. As such, the clearly erroneous standard was the appropriate one for reviewing the district court's finding. *Makris* is not to the contrary.

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[5] It is true, as petitioner states, Pet. 21-22, that the issue of competency is a mixed question of law and fact. That, however, is simply to say that the issue requires the court to apply a standard of law to facts that it finds. Here, the district court applied the correct standard of law: whether petitioner had the capacity to understand the proceedings and aid in his own defense. The only issue in dispute was the correctness of the court's finding that petitioner in fact had that capacity.

2. Contrary to petitioner's contention, Pet. 21-34, the district court did not err in finding that petitioner was competent to stand trial. There was sufficient evidence before the district court to show that during the period of his alleged incompetence, petitioner spoke (without a stutter) about a number of past events and future intentions, including his role in the drug conspiracy and his continued efforts to convince Dr. Butts and others that he was incompetent to stand trial. Pet. App. 6a. In light of this credited evidence, there was an adequate evidentiary basis for the district court to find that petitioner possessed a factual and rational understanding of the proceedings against him, and had a present ability to consult with his lawyer with a reasonable degree of rational understanding. The court of appeals therefore correctly upheld the district court's factual finding. As this Court explained in *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-574 (1985) (citation and punctuation omitted):

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

There is no merit to petitioner's additional contention that the district court erred in not adopting the

conclusions of the expert witness, Dr. Butts. Pet. 23. As petitioner concedes, "[i]t is well established that a factfinder need not adhere to an expert opinion on incompetency if there is reason to discount it." Pet. 28, citing *Strickland* v. *Francis*, 738 F.2d 1542, 1552 (11th Cir. 1984). See *White* v. *Estelle*, 669 F.2d 973 (5th Cir. 1982), cert. denied, 459 U.S. 1118 (1983); *Makris*, 535 F.2d at 908. The factors on which Dr. Butts relied in reaching his opinions were all within petitioner's control, and Dr. Butts acknowledged the possibility that petitioner might be feigning his conditions. Pet. App. 13a.[6] Moreover, in reaching his opinion, Dr. Butts did not have the benefit of having seen petitioner in his unguarded moments, when petitioner's true condition and the fraudulent nature of his incompetency claim would readily have been apparent. The district court, therefore, had a rational basis for discounting Dr. Butts's conclusions and finding petitioner to be competent.[7]

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[6] Petitioner claims that a trial court may not arbitrarily ignore the "unequivocal, uncontradicted and unimpeached testimony of an expert witness." Pet. 28 (quoting *Webster* v. *Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970), cert. denied, 404 U.S. 823 (1971)). Dr. Butts, however, testified that it was possible that petitioner was malingering, and the doctor's testimony also was contradicted by two lay witnesses. Tr. 32-34.

[7] Petitioner errs in claiming, Pet. 29, that the decision below conflicts with *Strickland* v. *Francis*, 738 F.2d 1542, 1552 (11th Cir. 1984). That case, like this one, holds that a trier of fact may disregard expert testimony on a defendant's mental condition. In *Strickland*, the court cited a number of factors that could lead a court to disregard expert testimony, such as "the correctness or adequacy of the factual assumptions on which the expert opinion is based * * * [and] the relevance and strength of the contrary lay testimony." 738 F.2d at 1552.

3. Petitioner argues that he did not receive a fair hearing on the question of his competence to stand trial. Pet. App. 35-42. First, he maintains that the government did not give him notice of its intention to call two lay witnesses who would testify that petitioner feigned incompetence. Petitioner failed to raise that objection at the time of the hearing, however, and he also did not seek a continuance on that ground. Pet. App. 9a.[8] Accordingly, petitioner has waived his claim in the absence of plain error. *United States* v. *Frady*, 456 U.S. 152, 162 (1982); *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).

Petitioner cannot establish plain error since, even assuming that the government erred by not notifying petitioner about its two lay witnesses, petitioner was not prejudiced by the claimed lack of notice. The record shows that petitioner was able to call David Denner as a witness in an attempt to rebut the testimony of the government's two lay witnesses. Gov't C.A. Br. 23. Moreover, petitioner was not prevented from providing the district court with additional evidence of his alleged incompetence. As the court of appeals explained, petitioner "was free to provide or describe" evidence in rebuttal to the government's winesses, as well as further evidence of petitioner's alleged incompetence, "in the supplemental post-hearing memoranda that the district court consulted prior to rendering its final decision." Pet. App. 10a. Petitioner did not do so. At no time before or after the competency hearing did petitioner ask the district

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[8] Petitioner contends he was surprised that the issue at the evidentiary hearing was whether he was faking incompetence. This claim seems unlikely in light of counsel for petitioner's question to Butts regarding whether petitioner could be faking his symptoms. Gov't C.A. Br. 23.

court to reopen the issue in light of new evidence. Gov't C.A. Br. 24.

Petitioner also alleges that the district court improperly considered information not on the record. Pet. 36. That claim is insubstantial, since the court merely took notice of facts that already were in the public record.[9]

Finally, petitioner contends that the district court denied him a fair hearing by not ordering a further examination for petitioner. Pet. 35. Although the district court predicted at the close of the competency hearing that it would solicit additional evaluations of petitioner, the court apparently did not believe that such tests were necessary once the court had reviewed the parties' post-hearing briefs. Pet. App. 9a-10a. On the basis of the evidence adduced at the competency hearing and in the post-hearing memorandums, the district court concluded that petitioner was faking his symptoms and was competent to stand trial. *Ibid.* Repeated competency examinations of a defendant are not generally required. *United States* v. *Maret*, 433 F.2d 1064, 1067 (8th Cir. 1970), cert. denied, 402 U.S. 989 (1971). Petitioner has not shown why the district court was wrong in applying that rule in this case.

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[9] The district court simply noted that details petitioner told Hansen and that Hansen testified about at the competency hearing were verified by one of petitioner's co-defendants in his plea and sentencing before the court. Pet. App. 14a-15a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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